

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re

VELMA R. & WILLARD L. DAVIS

Case No. 04-10558

Debtor(s)

APPEARANCES:

JASON BROTT, ESQ.
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Hon. Robert E. Littlefield, Jr., U.S. Bankruptcy Judge

MEMORANDUM-DECISION

Currently before the court is the motion of Velma R. Davis and Willard L. Davis (“Debtors”) to vacate their chapter 7 discharge and convert their case to chapter 13. Opposition to the motion has been filed by the USR Group, Inc. (“USR”). The court has jurisdiction pursuant to 28 U.S.C. §§ 157(a), 157(b)(1), 157(b)(2)(A), and 1334(b).

FACTS

Based upon the pleadings submitted, the court finds the following:

- 1) The Debtors filed a joint chapter 7 petition pro se on February 2, 2004.
- 2) On Schedule A, the Debtors list a joint interest in a single family home where they reside (the “Residence”), which they value at \$50,000.

- 3) On Schedule D, the Debtors list Central National Bank as the holder of a first mortgage against the Residence in the amount of \$32,000.
- 4) The Debtors received their discharge on May 5, 2004.
- 5) USR made an offer to the Trustee to purchase the estate's interest in the Residence.
- 6) In hearing of USR's purchase offer, the Debtors retained counsel and filed the within motion to vacate their chapter 7 discharge and to convert their case to chapter 13 on June 21, 2004. On July 6, 2004, USR filed opposition to the motion.

ISSUE

The primary issue before the court is whether the issuance of a chapter 7 discharge prevents the Debtors from converting their case to chapter 13. A secondary concern is the ability of the Debtors, if any, to waive their discharge.

ARGUMENTS

Relying upon *In re Marcakis*, 254 B.R. 77 (Bankr. E.D.N.Y. 2000), *In re Lesniak*, 208 B.R. 902 (Bankr. N.D.Ill. 1997), and *In re Schwartz*, 178 B.R. 340, 344 (Bankr. E.D.N.Y. 1995), USR objects to the conversion of the Debtors' case because "a debtor is prohibited from converting his case from chapter 7 to chapter 13 once he has received a discharge." (Opp'n to Debtors' Mot. to Convert at 2). In addition, USR asserts that there is no statutory basis for the Debtors to vacate their discharge.

The Debtors assert that they originally filed their petition pro se and failed to understand the nature of the Trustee's interest in the Residence. After consulting with counsel, the Debtors wish to retain the Residence and pay creditors through a chapter 13 plan.

DISCUSSION

The court recently issued a broad decision on conversion of a chapter 7 case to chapter 13 pursuant to 11 U.S.C. § 706(a) and the substantive and procedural issues attendant therewith.

See In re Carrow, Case No. 02-17838 (September 8, 2004).¹ In *Carrow*, this court looked to the express language of § 706(a) and held that a debtor has the right to convert subject to the debtor's case not having been previously converted and the debtor being eligible for chapter 13. *See* § 706 (a), (d). The court also addressed the specific issue raised in this case: whether the issuance of a chapter 7 discharge poses an impediment to a conversion to chapter 13. This court found nothing in the Bankruptcy Code prohibiting a discharged chapter 7 debtor from converting to chapter 13 or requiring as a condition to conversion that the discharge be vacated. *Carrow* at 17-18. The *Marcakis* and *Lesniak* genre of cases, relied upon by USR, provide virtually no statutory analysis and the only authority raised is citation to other cases with the same lack of analysis. *Id.* at 17. The court finds the reasoning contained in *In re Mosby*, 244 B.R. 79 (Bankr. E.D.Va. 2000), far more persuasive. As discussed in *Carrow*, if a discharged debtor is to be prevented from converting to another chapter, it is within the province of Congress to do so as it specifically did in § 1112(d)(2).² *Id.* at 18.

No issues were raised regarding a prior conversion by the Debtors or their eligibility for chapter 13 pursuant to § 109. Thus, the court finds no impediments to conversion of the Debtors' case to one under chapter 13. Since the court does not find the Debtors' chapter 7 discharge an obstacle to the conversion, it need not address the ability, if any, of a debtor to waive a chapter 7 discharge.

CONCLUSION

¹ The court assumes familiarity with the *Carrow* decision.

² Section 1112(d)(2) prohibits conversion from chapter 11 to chapters 12 or 13 if the debtor has already received a chapter 11 discharge.

Based on the foregoing, the case is converted to one under chapter 13, and a chapter 13 trustee shall be appointed. The Debtors' counsel shall submit an order in conformance with *Carrow*, and this decision.

Dated: September 9, 2004

Hon. Robert E. Littlefield, Jr.
U.S. Bankruptcy Judge